SUPREME COURT, U.S.
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. 720

COWLITZ TRIBE OF INDIANS, *Petitioner,*

vs.

THE CITY OF TACOMA, a Municipal Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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THE ARGUS PRESS, SEATTLE

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Supreme Court of the United States

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The above-named petitioner, by its counsel of record, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

OPINION BELOW

The judgment below was entered on August 16, 1957 (R. 110). The Petition for Rehearing was denied on October 16th, 1957 (R. 111).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

[1] For another facet of the City of Tacoma in its efforts to build the identical two dams, see Docket No. 509, October, 1957, term, *City of Tacoma v. Taxpayers of Tacoma*, Certiorari granted, December 9, 1957.

STATEMENT OF THE CASE[2]

The Cowlitz Tribe of Indians complained in the United States District Court that it was the owner of and is in the actual occupation of lands, fishing rights, hunting rights, water rights and burial grounds in the Cowlitz River Drainage in the State of Washington, holding the same by virtue of aboriginal possessory rights or original Indian title. The Indians sought to enjoin the City of Tacoma from building two dams on such property.

The City has admitted the building of the dams but

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[2] For the purposes of clarity we are submitting a broad summary of the facts in our Brief. We recognize the need, however, to submit a detailed and documented statement and so submit the following:

The Complaint (R. 3-13) alleged that the Indians owned and possessed in the Cowlitz River Drainage the lands (R. 3, 8), hunting, fishing and water rights (R. 4, 8, 10) and burial grounds (R. 6, 7). The allegations were supported by various affidavits, as to burial grounds (R. 27, 28, 29, 30, 73, 74); as to fishing and hunting rights (R. 28, 30, 40, *et seq.*, 69, 70, 72, 73); as to lands (R. 28, 31, 40, *et seq.*, 70, 72-73).

The answer (R. 13-20) admitted that more than $3,000 was involved (R. 14) and that respondent was building the dams in question (R. 14). Further, it admitted respondent failed to make any arrangements to move the graves (R. 14-15).

The answer further contained eight affirmative defenses (R. 18-20) the first four of which, at this stage of the proceeding, should be noticed. The first is, the Court has no jurisdiction, because Indian-title lands do not confer any rights on the Indians; second, whatever rights the Indians held were long since extinguished by Congress; third, the complaint is not based on a federal question; and, fourth, insufficient facts are stated in the Complaint on which to base a cause of action.

The City served some Requests for admission (R. 84-86) which listed patents from the United States on all the *real estate* which would be inundated by the dams. Among these patents were those issued to the Northern Pacific Railway Company [R. 85, Paragraphs (3) (4) (5)]. The petitioner did not respond to such requests and so the facts therein recited stood admitted.

The City moved for a preliminary hearing on the question of jurisdiction (R. 21-23), which was argued and jurisdiction found wanting and the action dismissed (R. 95).

claimed that the Indians had no rights cognizable at law or in equity. The City moved to dismiss the proceedings because the District Court had no jurisdiction, there being no diversity of citizenship and the Indians having no such property rights entitled to the protection of a Federal Court. The District Court dismissed for lack of jurisdiction (R. 95) and the Court of Appeals for the Ninth Circuit affirmed (R. 107-111).

The Complaint, Answer and Answers to Interrogatories, and unanswered Requests for Admissions, reveal that the Indians are living in the Cowlitz River Drainage, hunting and fishing there now and since time immemorial; that there are burial grounds located there where the ancestors of the Indians were buried. The United States has issued various patents to lands within the Drainage area, including a series of patents to the Northern Pacific Railroad Company. These latter patents are identical to those considered in *United States v. Santa Fe,* 314 U.S. 339 (1941), under an identical statute.[3] The City has acquired record title to all of

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[3] Petitioner is limiting the present discussion to the railroad patents without waiving the right to attack other patents for a later trial on the merits—if such a trial ensue. This thereby abbreviates the record, for petitioner believes if it succeeds in showing any kind of property right in itself, then a trial must be had when the full quantum of its rights may be examined.

The railroad Act involved in *United States v. Santa Fe,* 314 U.S. 339, is 14 Stat. 292, and in the instant case relating to the Northern Pacific Railway Company is 13 Stat. 365. The portion of the two statutes granting lands to the respective railroads (in each instance Sec. 3 thereof) is identical, word for word. There is a slight variation in Sec. 2 with respect to the manner in which the United States should extinguish the rights of the Indians. At this stage of the instant proceeding, we will not extend our discussion of the two statutes, believing that should Certiorari be granted we can then discuss the problem in detail.

Suffice it to say at the moment that " . . . the Warlapai had 'Indian title' which, unless extinguished, survived the railroad grant of 1866.

the *real estate* which will be inundated by acquiring title from such patentees.[4]

STATUTES

So far as the precise point is concerned, there is only the jurisdictional statute of 28 U.S.C. 1331 involved, which reads as follows:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

THE QUESTIONS PRESENTED

Does the Fourteenth Amendment to the United States Constitution confer jurisdiction on Federal Courts to enjoin a municipal corporation in expropriating property held by non-treaty Indians by virtue of "Indian title," sometimes called "aboriginal posses-

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[4] There is nothing in the record to dispute *actual* occupation of fishing, hunting and water rights and burial grounds by the petitioner. As to lands acquired by the respondent from the aforementioned patentees, there is nothing in the record to dispute actual occupation when the patents were issued. However, whether actual occupation still subsists today in a legal sense is a factual question, so far as such patented lands are concerned, which would require a trial on the merits to determine. But petitioner conceives that its burden here is merely to show *some* quantum of property which the city seeks to destroy without compensation, to prevent which, the injunction should issue.

Unquestionably, it has been the policy of the federal government from the beginning to respect the Indians' right of occupancy, which could only be interferred with or terminated by the United States." 314 U.S. 339, 345.

We further believe that since no effort either factually or by way of congressional authority has been made to dispute actual occupation of the fishing, hunting and water rights and burial grounds, that the latter confers sufficient property rights in the Indians to require the Court's intercession for the Indians' protection.

sions." The question is the counterpart to *Tee-Hit-Ton Tribe of Indians v. United States,* 348 U.S. 272, where the Court held that the *United States,* as distinguished from a *municipal corporation,* may so expropriate such property. The necessary corollary of the question is: Is the taking by a *municipal corporation* of lands owned by an Indian Tribe under original Indian title, the taking of a compensable interest in lands for which the municipal corporation is liable?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Petitioner believes that the question presented is one of major importance in the administration of Indian affairs: May a municipal corporation invade with impunity lands occupied by Indians under original Indian title? Included in such a question is, how much dignity does original-Indian-title lands have?

If Certiorari be granted and the Court answers the question directly, non-treaty Indian tribes can utilize the rule to be announced in this case in protecting their property against intrusion by third parties. It will enable them to protect themselves against others than the United States. It will enable such Indian tribe to diminish damages in later suits against the United States where a particular jurisdictional act authorizes damages against the United States for the latter's failure to protect the Indians from other parties.

We think that all will concede that if a municipal corporation seek to usurp private property that the Fourteenth Amendment would confer jurisdiction on a District Court to enjoin the same. That is hornbook

law and is supported by the following authorities: *Portland R. R. Co. v. City of Portland,* 181 Fed. 632, Appeal dismissed, 218 U.S. 686 (Bean, D.J., 1910 CC Ore.); *Iron Mountain, etc., v. City of Memphis* (CCA-6, 1899) at 96 Fed. 113; *Coyahoga River Power Co. v. City of Akron,* 240 U.S. 462 (1916).

The City argues, rather, that original Indian title is of so little dignity that a municipal corporation may oust the Indians at will.

There is no case which directly holds that a District Court has jurisdiction, invoked by an Indian tribe as plaintiff, to enjoin a municipal corporation from lands in actual occupation by Indians under original Indian title.

The respondent and the Court of Appeals relied on *Tee-Hit-Ton v. United States,* 348 U.S. 272, and seek to extend the doctrine that deprivation of Indian title land by the United States to such deprivation by lesser units of government; but the latter is excluded by that case as follows: "As between the Indians and the United States" (Page 279) the disability of the Indians exists, but '* * * (the) right of occupancy * * * the Sovereign * * * protects against intrusion by third parties * * * " which, of course, means parties like the respondent.

The City argues that because the Fifth Amendment does not protect the Indians from expropriation by the United States, that therefore the Fourteenth Amendment does not protect the Indians from expropriation by a municipal corporation.

But the public policy reasons for protecting the United States are not available to a *municipal corporation.*

The United States is the sovereign, the repository and creator of all law, the successor to the Kings of England, Spain, etc. The United States has adopted a policy of dealing with such property, when the United States is the expropriator, as a kindly father would do, and so, we have the Indian Claims Commission Act 28 U.S.C. 70 and the multitude of jurisdictional acts, conferring jurisdiction in the Court of Claims to recompense the Indians, even as to Indian-title lands.

How can the respondent, a municipal corporation, arrogate unto itself the power and dignity of the sovereign to wrest the ancestral home from the Indian?

Where the United States has seen fit to fulfill its duties as guardian, this Court has protected Indian-title lands, *United States v. Santa Fe,* 314 U.S. 339 (1941). But since the United States was a party, no question of jurisdiction could be raised. But we "think" the following phrases "have been so often and so long repeated * * * they should now be considered no longer open." 314 U.S. 339, 346.

Thus, *Minnesota v. Hitchcock,* 185 U.S. 373, 388-9, "Whether * * * a reservation * * * or unceded Indian country, * * * *the Indians' right of occupancy has always been held to be sacred;* something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Cherokee Nation v. Georgia,* 5 Pet. 1: " * * * *unquestioned right to the lands they occupy,* until * * * extinguished by a voluntary cession to our government; * * * " (p. 17). "Indians have rights of occupancy * * * *as sacred as the fee-simple,* absolute title of the whites; * * * " (p. 48).

Worcester v. Georgia, 6 Pet. 515, 557: " * * * a right to all the lands within (their territorial) boundaries, which is not only acknowledged, but guaranteed by the United States" (p. 557). *Mitchel v. United States*, 9 Pet. 711, 745-746: " * * * owning them by a perpetual right of possession in the tribe * * * (which, though fee was in the crown) could not be taken without their consent * * * their right of occupancy is considered as sacred as the fee-simple of the whites." *Leavenworth Railroad v. United States*, 92 U.S. 733, 742: " * * * unquestionable right to the lands they occupy, until * * * extinguished by a voluntary cession * * * This perpetual right of occupancy, with the correlative obligation of the government to enforce it. * * * " *United States v. Cook*, 19 Wall. 591, 593: " * * * right of Indians to their occupancy is as sacred as that of the United States to the fee, * * *." *United States as Guardian, etc., v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345, and *Cramer v. United States*, 261 U.S. 219, 227: "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy * * *." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 48: "It was the usual policy not to coerce the surrender of lands without consent and without compensation * * * Something more than sovereign grace prompted the obvious regard given to original Indian title." *United States v. Alcea Band*, 329 U.S. 49, 91 L.ed. 29, "As against any but the sovereign, original Indian title was accorded the protection of complete ownership" (p. 33). *Tee-hit-ton Tribe v. United States*, 348 U.S. 272, 99 L.ed.: "This is not a property right but amounts to a right of occupancy

which the sovereign grants and *protects against intrusion by third parties* * * * " (p. 320-21). *United States v. Santa Fe*, 314 U.S. 339, 342: "This Court has continuously recognized that aboriginal possession creates a possessory right *legally enforceable against everyone* except the United States." (p. 345)

Once we get past the hurdle that original-Indian-title lands are property, then it follows axiomatically that the Federal Courts have original jurisdiction under the Fourteenth Amendment to enjoin a municipal corporation destroying such property.

Petitioner believes that the primary question should be answered by this Court directly and is so plain, we think, that a Writ of Certiorari should be granted, the case transferred to the Summary Docket and the case reversed.

WHEREFORE, petitioner prays that a Writ of Certiorari issue to review the decision below, the cause to be transferred to the summary docket and the judgment below reversed and the cause remanded to the trial court for a trial on the merits.

Respectfully submitted,

Malcolm Stewart McLeod

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Attorney for Petitioner.

FREDERICK PAUL,
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of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE COWLITZ TRIBE OF INDIANS, *Appellant,*
vs.
CITY OF TACOMA, a municipal corporation, *Appellee.*
No. 15211

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, May 6, 1957
Before: HEALY, FEE and HAMLEY, Circuit Judges

ORDER OF SUBMISSION

ORDERED appeal herein argued by Mr. Malcolm S. McLeod, Mr. James E. Sareault and Mr. Frederick Paul, counsel for appellant, and by Mr. Marshall McCormick, counsel for appellee, and submitted to the court for consideration and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, August 16, 1957
Before; HEALY, FEE and HAMLEY, Circuit Judges

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE COWLITZ TRIBE OF INDIANS, *Appellant*,
vs.
CITY OF TACOMA, a municipal corporation, *Appellee*.

No. 15211
Aug. 16, 1957

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

Before: HEALY, FEE and HAMLEY, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

An action has been brought by the Cowlitz Tribe of Indians for damages and for an injunction against the City of Tacoma, to enjoin the latter from constructing two dams on the Cowlitz River and from selling any bonds in connection therewith. The essential basis of the claim of the Tribe is that the aboriginal title to all the real property used in construction of the proposed Mayfield and Mossyrock dams has never been extinguished. The Tribe claims fee simple title to all the lands at the sites and the property in all the waters of the Cowlitz. It is also alleged that fishing rights of the Tribe are and will be interfered with and that burial grounds of its ancients will be desecrated.

The City raised the question of jurisdiction in its answer. The Tribe answered a series of interrogatories by the City, but failed to respond to a request for admissions as to the genuineness of documents. The Tribe also filed several affidavits in support of its claim.

The trial court held a preliminary hearing to determine the affirmative defenses set out in the answer.[1] It considered the evidence, records and files in the case, in-

[1] See Federal Rules of Civil Procedure, Rule 12(d).

cluding the affidavits and exhibits. The District Court then dismissed for want of jurisdiction of the subject matter. The Tribe has appealed from this judgment.

The claim of the Tribe is that, while original title of other Indian tribes to land and water in the State of Washington was extinguished by treaty, the Cowlitz Tribe entered into no treaty. It is contended that the City is appropriating this real property in which the Indian title still subsists, and therefore just compensation must be paid. It is said this raises a federal question and that more than the jurisdictional amount is involved. Therefore, the District Court had jurisdiction, according to the contention presented on appeal.

The Tribe is presently prosecuting a proceeding against the United States under the provisions of the Indian Claims Act, wherein there is claimed all of the lands and rights in several counties and parts of counties of the State of Washington belonged to the Tribe, and that the United States has deprived them thereof.[2] The answer of the government is that the Tribe has no rights therein and the claim should be denied under Duwamish Tribe of Indians vs. United States, 79 Ct. Cls. 530, cert. den., 295 U.S. 755.[3] It is thus clear that the question is political and not justiciable. It would be otherwise if the government, as guardian and protector of these Indians, were bringing action for an invasion of the aboriginal title vested in them and recognized by the United States against trespassers or adverse claimants, even though the latter might hold grants from the government. United States vs. Santa Fe Pacific Railroad Co., 314 U.S. 339.

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[2] Simon Plamondon, on relation of the Cowlitz Tribe of Indians vs. United States, Indian Claims Commission, Petition No. 218, filed August 8, 1951.

[3] See also Tee-Hit-Ton Indians vs. United States, 348 U.S. 272, 285, reh. den., 348 U.S. 965.

The limitations of the jurisdiction of the District Court must be observed. Here neither diversity of citizenship nor a jurisdictional amount has been alleged. There is on the face of the pleading no federal question. The United States is not a party, as it was in the Santa Fe case. Here the Tribe does not allege that the United States has ever recognized any title in these Indians, either collectively or individually, by congressional action or by executive order. The primary question in a condemnation action is compensation for the title. The Cowlitz did not enter into any treaty with the government, so the construction of no such instrument is involved.

As a matter of history of which the District Court could take judicial notice, the United States did occupy all this territory, as sovereign and possessor, and has acted as the proprietor or grantor of all the lands involved for a century. The government has granted numerous parcels of these lands to private individuals, school districts and corporations. The City of Tacoma is successor to certain of these grantees. Part of the lands are in forest reserve. The City of Tacoma, as to the water to be impounded, is acting under license from the Federal Power Commission.

The controversy therefore does not arise under the Constitution, Treaties or any law of the United States. The trial court had no jurisdiction.

The appeal is dismissed.

(Endorsed:) Opinion. Filed Aug. 16, 1957.
Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE COWLITZ TRIBE OF INDIANS, *Appellant*, vs. CITY OF TACOMA, a municipal corporation, *Appellee*.	No. 15211

JUDGMENT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court that the appeal in this cause be, and hereby is dismissed.

(ENDORSED) Judgment.

Filed and entered August 16, 1957.

PAUL P. O'BRIEN, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE COWLITZ TRIBE OF INDIANS, *Appellant*, vs. CITY OF TACOMA, a municipal corporation, *Appellee*.	No. 15211

UPON PETITION FOR REHEARING

Before: HEALY, FEE and HAMLEY, Circuit Judges

Appellant misconstrues the opinion of this Court. The decisive point is that the District Court had no jurisdiction of the alleged cause. The history was noticed as illustrative.

The petition for rehearing is denied.

(ENDORSED)

Filed October 16, 1957.

PAUL P. O'BRIEN, Clerk.